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Nos. 87-2050, 88-90, 88-96

In the Supreme Court of the United States

October Term, 1988

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania, the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania, and CHABAD,

Petitioners,

vs.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief of Petitioner, County of Allegheny

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QUESTION PRESENTED

Whether the County of Allegheny's display of a privately owned nativity scene inside the Allegheny County Courthouse as part of an annual seasonal celebration of the Christmas holiday violates the Establishment Clause of the First Amendment of the United States Constitution.

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In the Supreme Court of the United States

October Term, 1988

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE PETITIONER COUNTY OF ALLEGHENY

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 842 F.2d 655 and appears at pp. 7a to 43a in the Petition for a Writ of Certiorari. The memorandum opinion of the United States District Court for the Western District of Pennsylvania is not officially reported and appears at pp. 1a to 5a in the Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the panel of the Third Circuit Court of Appeals was entered on March 15, 1988. The Order of the Third Circuit denying the Court of Allegheny's petition for rehearing before the Court in banc was entered on April 19, 1988. The Petition of the County of Allegheny for a Writ of Certiorari was filed on June 14, 1988 and the Writ was issued on October 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The provision of the United States Constitution involved in this case is the Establishment Clause of the First Amendment as made applicable to the States through the Fourteenth Amendment. The Establishment Clause of the First Amendment states:

> "Congress shall make no law respecting an establishment of religion . . . ."

STATEMENT OF THE CASE

Since 1968, Allegheny County has invited various choirs to participate in a Christmas carol program. (J.A. 157). The performances for the program are scheduled during the weeks preceding the Christmas holiday and are

held in two locations: the rotunda of Greater Pittsburgh International Airport and the first floor of the County Courthouse (J.A. 157-58) in an architecturally impressive area known variously as the Grand Staircase (J.A. 157) and the Courthouse Gallery/Forum. (J.A. 163). Each performance consists of various choirs, typically high school students (J.A. 158), singing both popular songs as well as religious and secular Christmas carols. (J.A. 169). The program is annually dedicated to the universal themes of world peace and brotherhood and to the memory of the missing in action of the Vietnam War. (J.A. 160, 175). The carol program is publicized by a large banner hung outside the County Courthouse (J.A. 167; Def. Ex. H; R. 126, 128) and by press releases. (J.A. 159). At the Courthouse, the caroling is broadcast by loudspeakers to the public at large. (J.A. 167).

On the steps of the Grand Staircase where the choirs perform is erected a nativity scene or creche. (J.A. 161; Def. Ex. I; R. 126, 129). The creche consists of the traditional figures—a wooden stable with the infant Jesus, the Virgin Mary, Joseph, the Three Wise Men, the Shepherds, various animals and an angel holding a banner reading "Gloria in Excelsis Deo". (J.A. 164). The figurines range in height from three to fifteen inches. (J.A. 164). The nativity scene is enclosed by a fence and takes up a small area on the Grant Staircase. (J.A. 186).

The entire area of the Courthouse where the Christmas carol program is held and the nativity scene is displayed is decorated in traditional Christmas fashion—red and white poinsetta plants, evergreen trees with red bows and Christmas wreaths. (J.A. 161). These decorations are purchased and arranged by the County's Bureau of Cultural Programs. (J.A. 199). Other decorations, including

wreaths, trees and Santa Clauses, are displayed by various departments and offices throughout the Courthouse building. (J.A. 167).

Although a nativity scene has been displayed in conjunction with the choral program since the program's inception, (J.A. 157, 161, 189) the particular nativity scene displayed on the steps of the County Courthouse at the time in question has only been used as part of the choral program since 1981. (J.A. 164). This nativity scene is not owned by the County; rather, it is the property of the Holy Name Society of the Diocese of Pittsburgh, a Catholic mens' organization. (J.A. 164). Ownership of the creche is noted by a sign in front of the nativity scene which reads "This display donated by the Holy Name Society." (J.A. 164).

Other than providing storage space in the basement of the Courthouse for the past two years (J.A. 165) and a dolly to transport the display to and from its place of storage (J.A. 165), the County has no other involvement with the nativity scene. The County provides no special security, lighting or maintenance for the display. (J.A. 165). Moreover, the creche is erected, arranged and disassembled each year by the moderator of the Holy Name Society without the assistance of County personnel. (J.A. 165).

In addition to serving as one of the locales for the annual Christmas carol program, the Grand Staircase—Gallery/Forum Area of the County Courthouse is used throughout the year for art displays (J.A. 163, 167) and other civic and cultural events and programs. (J.A. 176).

In November, 1986, the American Civil Liberties Union (ACLU) sent a letter to the County's Board of Commissioners requesting removal of the nativity scene. (J.A. 90-91). In a written response to this letter, the County Commissioners disavowed any intent to endorse any particular religion through the display. The Commissioners wrote that the purpose of the display of the nativity scene, along with other holiday symbols, was simply to express the wish of "Good Will to All Men". (Def. Ex. A; R. 51, 52).

On December 10, 1986, the ACLU and several individuals filed a complaint pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) in the United States District Court for the Western District of Pennsylvania seeking to enjoin the County of Allegheny from displaying a nativity scene inside the Courthouse and the City of Pittsburgh from displaying a Chanukah menorah outside the City-County Building. After denying an application for a temporary restraining order, the Honorable Barron P. McCune scheduled a hearing on a motion for a preliminary injunction for December 15, 1986. At the conclusion of the hearing, the District Court denied the motion for a preliminary injunction.

In his brief oral opinion, Judge McCune indicated that the case was controlled by *Lynch v. Donnelly*, 465 U.S. 668 (1984). (J.A. 8). Judge McCune found that the display of the creche and the menorah conveyed no message of government endorsement and were *de minimus* in the context of the application of the Establishment Clause. (J.A. 9, 10).

Subsequent to the hearing on the motion for a preliminary injunction, Chabad, a Jewish group which owns the menorah and which attempted to intervene in the case during the preliminary injunction hearing, filed a formal

motion to intervene. The District Court granted Chabad's motion to intervene and a second hearing was held on April 24, 1987 for the limited purpose of permitting Chabad to present evidence concerning the menorah. (J.A. 61).

By opinion and order dated May 8, 1987, Judge McCune denied the ACLU's motion for a permanent injunction and declaratory relief. On May 29, 1987, judgment in the case was formally entered in favor of the County and the City, and an appeal followed. (J.A. 11).

In a decision dated March 15, 1988, the Third Circuit Court of Appeals reversed the judgment of the District Court. By a vote of two-to-one, the Court of Appeals held that the display of a nativity scene inside the County Courthouse had the effect of endorsing religion and thus violated the second prong of the three-part establishment test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

In reversing the District Court's decision, the Third Circuit's panel majority relied upon no specific factor in declaring the display inside the Allegheny County Courthouse unconstitutional. Instead, the majority listed six so-called objective "variables" that a court should consider in determining whether the use of a religious symbol in a display on public property or by a public entity has the effect of advancing or endorsing religion. These factors are: (1) the location of the display; (2) whether the display is part of a larger configuration including nonreligious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display. (Cert. Pet. 22a).

The dissenting opinion in the Court of Appeals agreed with the District Court that the *Lynch* decision "directly addresses and conclusively resolves the dispute we encounter here." (Cert. Pet. 33a). The dissent declared that "irrelevant and inconsequential variations" in the location and arrangement of a display did not "justify disregarding the clear spirit of *Lynch*." (Cert. Pet. 35a-36a). The dissent concluded that the panel majority's decision strayed from the *Lynch* decision's course of "moderation, understanding, and a sense of proportion in ruling on displays commemorating the Christmas season." (Cert. Pet. 40a).

On April 19, 1988, the Circuit Court denied the County's petition for rehearing before the Court in banc. Five judges of the Court voted in favor of granting rehearing by the Court in banc and the panel's dissenting judge voted in favor of panel rehearing. (Cert. Pet. 45a).

On October 3, 1988, this Court granted the County's petition for certiorari.

SUMMARY OF THE ARGUMENT

In *Lynch v. Donnelly*, this Court held that the display of a nativity scene by a municipality does not violate the Establishment Clause of the United States Constitution. In deciding *Lynch*, the unmistakable thrust of this Court was not merely to determine the constitutionality of one particular display in one city during one Christmas season but to establish broad principles generally recognizing that the long practice of displaying nativity scenes during the Christmas holiday under municipal auspices constitutes neither an impermissible endorsement of religion nor a real threat to the aims of the Establishment Clause. That this Court intended its decision in *Lynch* to have application beyond its particular facts is evidenced by its choice of the context of the season, a standard applicable to all holiday displays, as the analytical framework for examining the constitutionality of municipal nativity displays.

Despite the seeming clarity of *Lynch*, several divided circuit courts of appeal have held that *Lynch* is limited to its particular facts. The attempts in these cases to distinguish Lynch based on a Christmas display's physical context—i.e.—its arrangement or location, are expressly contrary to the teachings of *Lynch* and should be rejected.

An attempt to distinguish *Lynch* based upon the content or arrangement of a municipal nativity scene has no basis of support in *Lynch*. In that case, this Court never viewed the specific secular decorations in the City of Pawtucket's display as having any crucial bearing on the constitutional question before it. More importantly, a physical content distinction of *Lynch* is unsound because it makes trifling details of Christmas minutia matters of constitutional significance. This physical content distinction inevitably trivializes the constitutional principles set forth in

Lynch and leads to endless litigation over the constitutionality of every municipal Christmas display.

An attempt to distinguish *Lynch* based upon the location of a municipal nativity scene on public property is as unpersuasive as the distinction based upon content and arrangement. Focusing upon public property and using it as an automatic invalidation device would require this Court to give special significance to a factor treated as essentially irrelevant in prior cases. Additionally, the physical location distinction greatly exaggerates the threat to religious liberty conveyed by a passive symbol. Finally, the physical location distinction would impose an absolutist view of the Establishment Clause, a position this Court has consistently rejected.

Even if the constitutionality of a holiday display turns on its particular content and location, the County Courthouse display would still pass constitutional muster under either the *Lemon* test, as applied in *Lynch,* or the endorsement test proposed by Justice O'Connor. Like the display in *Lynch,* the Courthouse display has a secular purpose, confers only indirect, remote and incidental benefits on religion and presents little danger of excessive administrative entanglements. Examining the history, language and administration of the County Courthouse display, an objective observer would conclude that the County's seasonal display was a celebration of the Christmas holiday and not an endorsement of religion.

ARGUMENT

I. THIS COURT'S HOLDING IN *LYNCH V. DONNELLY* IS DISPOSITIVE OF THE ISSUE OF WHETHER A MUNICIPAL DISPLAY OF A NATIVITY SCENE IS CONSTITUTIONAL.

In determining whether the placement of a nativity scene inside the Allegheny County Courthouse was constitutional, the Third Circuit panel's majority opinion referred to this Court's decision in *Lynch v. Donnelly*, 465 U.S. 668 (1984) as "the starting point" of its analysis. *American Civil Liberties Union v. County of Allegheny*, 842 F.2d 655, 659 (3rd Cir. 1988). But after reviewing *Lynch* and labeling it as "a decision of great significance," *id.* at 660, the panel majority—without any explanation or comment—simply failed to follow it. Instead, the panel majority proceeded to analyze the nativity scene displayed in the County Courthouse under the familiar establishment test of *Lemon v. Kurtzman*. The Third Circuit's resort to the *Lemon* test for a reexamination of the question of the constitutionality of municipal nativity displays was clearly erroneous because that question was definitively answered by *Lynch*.

In *Lynch*, this Court held that the City of Pawtucket's inclusion of a nativity scene in a seasonal holiday display did not violate the Establishment Clause. In upholding the constitutionality of the City's display of the nativity scene, this Court in *Lynch* utilized the three-pronged test articulated in *Lemon*.

Addressing initially the issue whether the Pawtucket nativity scene had a secular purpose, Chief Justice Burger, writing for the majority, declared that the district court

had erred by focusing exclusively on the religious nature of the creche. The Chief Justice stated that the focus of the *Lemon* inquiry must instead be on the creche in the context of the Christmas season. *Lynch*, 465 U.S. at 679. Viewed in this perspective, the Court declared that the secular purpose prong of the *Lemon* test was satisfied because the nativity scene display was sponsored by the City to celebrate the Holiday and to depict the historical origins of an event long recognized as a national holiday. *Id.* at 681.

Chief Justice Burger next stated that the nativity scene in *Lynch* did not have a primary effect of advancing religion. In making this determination, the Court stated that inclusion of the nativity scene conferred no greater benefit to religion that those practices found constitutional in other cases. *Id* at 681. While conceding that the display of a nativity scene would advance religion "in a sense", *id.* at 683, the Court nevertheless found such aid or benefit to be "indirect, remote and incidental." *Id.*

Finally, this Court found that the nativity scene in *Lynch* did not create an excessive entanglement between government and religion. The majority in *Lynch* noted the absence of any excessive administrative entanglements between the government and religion surrounding the erection of the City's nativity scene. The Court added that in the absence of such administrative entanglement, claims of political divisiveness alone were insufficient to invalidate otherwise permissible government conduct. *Id.* at 684.

In conclusion, Chief Justice Burger emphasized that banning the creche from the municipal display in question "would be a stilted overreaction." *Id.* at 686. The Chief Justice labeled the notion that a municipal display of a

nativity scene posed a real danger of establishment of a state church as "far-fetched indeed," *Id.*

Although joining in the opinion of the Court in *Lynch*, Justice O'Connor wrote a concurring opinion suggesting a clarification of Establishment Clause doctrine based upon the notion of governmental endorsement or disapproval of religion. *Id.* at 688.

Justice O'Connor initially stated that the purpose of including the nativity scene in the Pawtucket display was the "celebration of the public holiday through its traditional symbols." *Id.* at 691. (O'Connor, J., concurring). Justice O'Connor concluded: "Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose." *Id.*

Justice O'Connor further declared that the display of a creche does not actually communicate a message of government endorsement of Christianity. While noting "the religious and indeed sectarian significance of the creche," Justice O'Connor found that "the overall holiday setting . . . negates any message of endorsement of that content." *Id.* at 692 (O'Connor, J., concurring).

Given this Court's statements in *Lynch*, the Third Circuit's description of that decision as "the starting point" for resolving this case is only partially correct; *Lynch* is not only the starting point but the ending point as well because the clear teachings of *Lynch* extend well beyond one particular display in one particular city during one Christmas season.

The true significance of *Lynch* clearly lies not in its particular facts but in its formulation of broad principles generally applicable to the erection of Christmas-time displays of nativity scenes under municipal auspicies. These

broad principles state the long practice of displaying nativity scenes during the holiday season under municipal auspices constitutes neither an impermissible endorsement of religion nor a real threat to the aims of the Establishment Clause. Put in more practical terms, *Lynch* holds that a municipality may display all of the symbols of Christmas without endorsing Christianity. *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 131 (7th Cir. 1987) (Easterbrook, J., dissenting).

Because it failed to follow the clear teachings and spirit of *Lynch v. Donnelly*, the controlling precedent in this case, the Third Circuit's reexamination of the constitutionality of the holiday display in the County Courthouse was clearly erroneous and, therefore, should be reversed.

II. THE HOLDING IN *LYNCH* CANNOT BE DISTINGUISHED ON THE BASIS OF A DIFFERENT PHYSICAL CONTEXT

Despite the seeming clarity of this Court's holding in *Lynch* that a municipal nativity scene erected during the holiday season does not constitute any real danger of an establishment of religion, several divided courts of appeal have given that decision a very narrow reading. These courts have seized upon Chief Justice Burger's detailed description of the City of Pawtucket's display[1] in order to justify distinguishing *Lynch* on its facts, reapplying the *Lemon* test and finding a nativity display in a different physical context violative of the Establishment Clause. The cases which have distinguished *Lynch* have generally been of two types.

The first type, exemplified by the cases of *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied* 107 S.Ct. 421 (1986), and *Burelle v. City of Nashua*, 599 F.Supp. 792 (D.N.H. 1984), holds that the constitutionality of a municipal holiday display is dependent upon the content of the display—i.e., its actual physical arrangement. Therefore, "an unadorned creche"—a nativity scene without the secular Christmas figurines present in *Lynch* such as reindeer and Santa Claus—is unconstitutional.

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[1]Chief Justice Burger noted that the display included, among other things, "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant and a teddy bear, hundreds of colored lights, [and] a large banner that read "Seasons Greetings." 465 U.S. at 671. The size, cost and expenses related to the creche were also noted. *Id.*

The second, exemplified by the case of *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987), holds that the constitutionality of a municipal holiday display is dependent upon the location of the display. Therefore, a display of a creche on public property as opposed to one in a private park as in *Lynch*, even if accompanied by secular Christmas symbols, is unconstitutional. The court in *Chicago* reasoned that the mere presence of such a religious symbol on public property automatically creates the implication of government approval and unavoidably fosters an inappropriate identification with religion.

Such attempts to limit *Lynch* based upon the physical context of a municipality's display of a nativity scene are wholly without merit.

A. THIS COURT'S DECISION IN *LYNCH* WAS NOT BASED ON THE CONTENTS OR LOCATION OF A HOLIDAY DISPLAY

In deciding *Lynch v. Donnelly*, the unmistakable thrust of this Court was not merely to examine whether one particular holiday display in one city during one Christmas season was unconstitutional. Rather, this Court utilized *Lynch* to formulate a broad rule of constitutional law generally applicable to the display of nativity scenes under municipal auspices. That this Court intended its decision in *Lynch* to have application beyond its particular facts is evidenced by its choice of a broad standard—the context of the season—as the proper analytical framework for examining the constitutionality of municipal nativity scenes.

Throughout the majority opinion, Chief Justice Burger consistently referred to "the creche in the context of the Christmas season." *Lynch*, 465 U.S. at 679, 680. The former Chief Justice further stated:

> To forbid the use of this one passive symbol—the creche—*at the very time people are taking note of the season* with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted overreaction contrary to our history and our holdings.

Id. at 686 (emphasis added).

Justice O'Connor also took notice of the importance of the "context of the season" in her concurring opinion. Justice O'Connor declared:

> Although the religious and indeed sectarian significance of the creche, as the district court found, is not neutralized by the setting, *the overall holiday setting* changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that context.

Id. at 692 (emphasis added)

The significance of the context of the season was duly noted by the Second Circuit in the case of *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court sub nom. Board of Trustees of Village of Scarsdale v. McCreary*, 471 U.S. 83 (1985). In the only

unanimous post-*Lynch* appellate decision,[2] the appeals court labeled as "erroneous", *id.* at 729, the argument that *Lynch* could be distinguished based upon the particular physical context of a municipality's display of a nativity scene. The Court in *McCreary* declared: "The Supreme Court did not decide the Pawtucket case based upon the physical context within which the display of the creche was situated." *Id.*

In short, by adopting a seasonal context, a standard applicable to all holiday displays, this Court clearly signaled that, notwithstanding its religious element, the display of a nativity scene under municipal auspices passed Establishment Clause scrutiny. Given the choice of this analytical framework, any attempt to graft a physical context limitation onto *Lynch* should be rejected.

B. DISTINGUISHING *LYNCH* BASED ON THE CONTENT OF A MUNICIPAL CHRISTMAS DISPLAY IS ARTIFICIAL AND FRIVOLOUS.

As noted previously, several courts have held that this Court's decision in *Lynch v. Donnelly* is limited to its particular facts. Thus, a different result can be reached if

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[2]The recently decided district court case of *Doe v. City of Warren*, No. 87-30084 (E.D. Mich. Oct. 20, 1988) also recognized the significance of the context of the season in determining the constitutionality of holiday displays. In *City of Warren*, the district court held that a display of a variety of symbols of the Christmas holiday season, both secular and religious, on the front lawn of the Warren City Hall did not violate the Establishment Clause. The Court in *City of Warren* notes: "The circumstances of apparent importance in *Lynch* included the 'context of the season,' a factor virtually overlooked in the opinions previously discussed." *Doe v. City of Warren*, No. 87-30084, slip op. at 5 (E.D. Mich. Oct. 20, 1988). The memorandum opinion in *City of Warren* is attached hereto as Appendix A to this Brief.

the physical context of a municipal Christmas display is different from the one in *Lynch*. One line of cases in particular holds that the constitutionality of a municipal Christmas display is dependent upon its content—i.e.—its actual physical arrangement. *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986); *Burelle v. City of Nashua*, 599 F.Supp. 792 (D.N.H. 1984). Therefore, "an unadorned creche"—a nativity scene without the specific secular Christmas figurines noted in *Lynch*—is unconstitutional. A physical content distinction is not only unsupported by *Lynch* but also is an artificial distinction inviting frivolous litigation and inevitably trivializing constitutional adjudication.

In *Lynch*, this Court never viewed the specific secular decorations in the City of Pawtucket's display as having any crucial bearing on the resolution of the constitutional question before it. Other than in his initial description of the Pawtucket display, Chief Justice Burger never mentioned the secular Christmas decorations in the Court's opinion, let alone attributed any special significance to their presence. Moreover, both Chief Justice Burger and Justice O'Connor noted that the secular decorations did not drain or nullify the religious and sectarian significance of the creche. *Lynch*, 465 U.S. at 685, 692. Thus, the *Lynch* decision itself provides no support for distinguishing municipal holiday displays based upon Christmas minutia.

More importantly, a physical content distinction of *Lynch* is fundamentally unsound because it artificially elevates trifling details about the particulars of a municipal display into matters of high and vital constitutional importance. The dissent in *American Civil Liberties Union v. City of Birmingham* aptly describes this fastidious concern

over the particulars of the arrangement of a municipal holiday display as the "St. Nicholas too" test:

> The lesson comes down to this: a city is free to display such a scene at Christmas if it is balanced by symbols which, although they may also be associated with Christmas, are considered secular in origin. If enough such symbols are displayed, the manger scene will pass constitutional muster. It may be convenient to think of this as a "St. Nicholas too" test—a city can get by with displaying a creche if it throws in a sleigh full of toys and a Santa Claus, too.

791 F.2d at 1569.

The dissent in *City of Birmingham* cogently observed the ridiculous and frivolous nature of the application of this "St. Nicholas too" test:

> The application of such a test may prove troublesome in practice. Will a mere Santa Clause suffice, or must there also be a Mrs. Claus? Are reindeer needed? If so, will one do or must there be a full compliment of eight? Or is it now nine? Where in the works of Story, Cooley or Tribe are we to find answers to constitutional questions such as these?
>
> The point I am trying to make is a serious one, of course.

* * * * *

The symbolism of Christmas in the 20th Century A.D. continues to incorporate many pagan elements, and Christmas would hardly be Christmas, for most Americans, without them. But I question whether it is appropriate for federal courts to tell the towns and villages of America how much paganism they need to

> put into their Christmas decorations, and I am reluctant to attribute to the Supreme Court an intent to point us in that direction by implication.

Id.

The end result of the application of a physical content distinction of *Lynch* is the trivialization of the Constitution. As Judge Easterbrook observed in his dissenting opinion in *American Jewish Congress v. City of Chicago*:

> It is discomforting to think that our fundamental charter of government distinguishes between painted and white figures—a subject the parties have debated—and governs the elements of a display, thus requiring scrutiny more commonly associated with interior decorators than with the judiciary.

827 F.2d at 129.

Judge Easterbrook continued:

> It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying that they were offended—but would have been less so were the creche five feet closer to the jumbo candy cane.

Id. at 130.

Clearly, the common sense reading of *Lynch* is one which focuses on the creche in the context of the holiday season and not on a headcount of ornaments and figurines in a holiday display. It avoids frivolous litigation over such meaningless matters as a few feet and a few characters and provides clear and understandable constitutional guidelines. Comment, *Constitutional Law—American Civil Liberties Union v. City of Birmingham: Establishment*

Clause Scrutiny of a Nativity Scene, 62 Notre Dame L. Rev. 114 (1986). Most of all, it complies with the wise admonition of Chief Justice Marshall who said: "[W]e must never forget, that it is *a constitution* we are expounding." *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 4 L.Ed. 579, 601 (1819). (emphasis added).

C. DISTINGUISHING *LYNCH* BASED ON THE LOCATION OF A MUNICIPAL CHRISTMAS DISPLAY IS WITHOUT PRECEDENT, PRESENTS AN EXAGGERATED NOTION OF GOVERNMENT ENDORSEMENT AND IMPOSES AN ABSOLUTIST VIEW OF THE ESTABLISHMENT CLAUSE

A physical context limitation of *Lynch* based upon the location of a nativity scene on public property is as unpersuasive as the limitation based upon content. As expressed by the majority in *American Jewish Congress v. City of Chicago*, this location limitation maintains that a nativity scene placed on public property is unconstitutional because the mere presence of such a religious symbol in a government building automatically creates the implication of government approval and unavoidably fosters an inappropriate identification with religion. *City of Chicago*, 827 F.2d at 128. Such a conclusion that the mere location of a religious symbol on public property is determinative of whether government endorses religion is seriously flawed in several respects.

First, unlike the court in *City of Chicago*, this Court has never used public property as a tripwire for Establishment Clause invalidity. Rather, this Court has always examined "all of the circumstances of a particular relationship" to determine the permissibility of a governmental

practice or program. *Lemon*, 403 U.S. at 614. This is demonstrated by the decisions of this Court in cases involving government sponsored religious practices or government programs advancing religion in the public schools. In these cases, this Court never relied upon the public property locus of the practice or program as the sole and exclusive reason for invalidating that practice or program under the Establishment Clause. Instead, this Court cited other concerns and factors such as the impressionable nature of elementary and secondary students, the inherent coercive nature of the practice or the clear intent of government to inculcate religious doctrine or to facilitate its dissemination as the bases for declaring that practice or program unconstitutional. *See, e.g., Edwards v. Aguillard*, 482 U.S. ___, 107 S.Ct. 2573 (1987) (Louisiana law requiring the balanced teaching of creation science and evolution); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Alabama statute authorizing moment of silence for school prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (posting a permanent copy of the Ten Commandments in classroom); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (statute forbidding the teaching of evolution); *Abington School District v. Schempp*, 374 U.S. 203 (1963) (daily reading of the Bible); *Engel v. Vitale* 370 U.S. 421 (1962) (recitation of denominationally neutral prayer); *Illinois ex. rel. McCollum v. Board of Education*, 333 U.S. 203 (1948) (religious instruction on school premises).

The relative non-importance of a public property locus to this Court's determination of the invalidity of a government practice under the Establishment Clause is further demonstrated by the case of *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, this Court upheld a clear religious practice—public prayer—by a publicly funded

clergyman not just on public property but at the very center of government: the chambers of a state legislature. Rejecting the argument that legislative prayer was "symbolically placing the government's official seal of approval on one religious view," this Court stated:

> [T]he practice of opening legislative sessions with prayer has become part of the fabric of our society.
>
> * * * *
>
> [I]t is simply a tolerable acknowledgement of beliefs widely held among the people of this country.

463 U.S. at 792.

This Court's treatment of public property as an insignificant happenstance in determining the constitutionality of a challenged program or practice is reflected as well in the *Lynch* decision itself. Although the display at issue in *Lynch* was located on private property, this Court implicitly dismissed the location of the display as a significant distinction. Chief Justice Burger expressly analogized the City of Pawtucket's display to "those to be found in hundreds of towns or cities across the nation—*often on public grounds*—during the Christmas season." *Lynch*, 465 U.S. at 671 (emphasis added).

Given the unimportance of public property as a factor in this Court's Establishment Clause decisions, the use of public property as an automatic invalidation device as was done in the *City of Chicago* case is unprecedented and improper.

Secondly, the location distinction of *Lynch* advanced by the *City of Chicago* case greatly exaggerates the threat to religious liberty posed by the display of a nativity scene on public property. In the *City of Chicago* case, the court

resorted to abstraction by maintaining that the display of a nativity scene on public property somehow suggested a symbolic alliance between government and Christianity, an alliance that indirectly but unmistakably coerced religious minorities. To support this abstract notion, the majority in *City of Chicago* cited the testimony of one offended individual. *City of Chicago,* 827 F.2d at 128n.3.

Preliminarily, one must seriously question whether a real threat to religious liberty can be based, as was done in the *City of Chicago,* upon the uncertain foundation of personal sensitivities. Paulsen, *Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication,* 61 Notre Dame L.Rev. 311, 353 (1986); Crabb, *Religious Symbols, American Traditions and the Constitution,* 1984 B.Y.U.L. Rev. 509, 540 (1984); *cf., Illinois ex. rel. McCollum v. Board of Education,* 333 U.S. at 233 (Jackson, J., concurring).

But more importantly, there is nothing about a public property locus which suddenly and dramatically makes a passive display of a religious symbol more coercive or a greater threat to religious liberty than a display on private property. As the District Court pointed out in this case, no one "must read, or sing, or talk or pause, or do something affirmatively" in front of the display. (J.A. 10). This observation is applicable regardless of the location of a display. Citizens using the County Courthouse are as free to ignore the nativity scene as citizens using the private park in Pawtucket. Acknowledgement of the origins of a popular holiday does not compromise any citizen's religious preferences.

Moreover, even if the notion of a coercive symbolic union were valid in the abstract, it dissolves in the face of this case. The record is absolutely devoid of any indication

that the Courthouse display "has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95.

Finally, the position taken in *City of Chicago* that the location of an object or an article having a religious dimension on government property connotes governmental endorsement inevitably leads to an absolute separation of government and religion contrary to long-established judicial precedent. If the mere placement of an object or article having any religious significance or origin on government property is axiomatically an endorsement of religion as the majority in *City of Chicago* maintains, then the only inquiry left to a court is to determine whether the object or article has some religious dimension. Since a religious dimension is often times easily identifiable,[3] many objects currently displayed on government property[4] would be prohibited under the view advocated in the *City of Chicago* case.

But an inquiry which focuses exclusively on the religious component of any activity is contrary to the express teachings of *Lynch v. Donnelly*. This Court in *Lynch* rejected this simplistic view of focusing on the religious component of an activity or object. *Lynch*, 465 U.S. at 680. This Court declared that such an exclusive focus promoted an inevitable invalidation of the activity or practice under

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[3]In *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), Justice Jackson declared: "The fact is that, for good or ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences." *Id.* at 236 (Jackson, J., concurring)

[4]Some obvious examples are religious paintings in government-sponsored galleries, Moses with the Ten Commandments in the Chambers of the Supreme Court and chapels in Congress. *Lynch v. Donnelly*, 465 U.S. at 677.

an absolutist view of the Establishment Clause, a position the Supreme Court has consistently rejected. *Id. at 678; see, e.g., Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 765 (1973); *Lemon v. Kurtzman,* 403 U.S. 602, 614 (1971); *Walz v. Tax Commission* 357 U.S. 664, 671 (1970); *Zorach v. Clauson,* 343 U.S. 306 (1952).

In many counties and towns, the courthouse or city hall is the only publicly owned property. Thus, a blanket ban of nativity scene displays from county courthouses and city halls would, in effect, prohibit most municipal governments from erecting any Christmas holiday displays that include a creche. This result would circumvent the basic holdings of *Lynch v. Donnelly.*

In summary, a location distinction of *Lynch* is weak and unconvincing. It would require this Court to give special significance to a factor treated as essentially irrelevant in prior cases. It would greatly exaggerate the so-called threat to religious liberty conveyed by a passive symbol. It would impose an absolutist view of the Establishment Clause which would erroneously curtail, if not outright eliminate, government contact with objects having a religious element. For these reasons, the location context distinction of *Lynch* should be rejected.

III. ALLEGHENY COUNTY'S CHRISTMAS DISPLAY SATISFIED BOTH THE *LEMON* AND THE ENDORSEMENT OF RELIGION TESTS

Even if one accepts the curious notion that the constitutionality of a holiday display turns on its particular contents and location, Allegheny County's 1986 Christmas display still would pass constitutional muster. The County's display not only satisfies the *Lemon* test, as applied in *Lynch v. Donnelly,* but also the endorsement test proposed by Justice O'Connor.

A. *LEMON* TEST

In *Lemon,* this Court stated that a challenged governmental practice would pass constitutional muster if it had a secular legislative purpose, if its primary effect neither advanced nor inhibited religion, and if it did not foster an excessive entanglement with religion. *Lemon,* 403 U.S. at 612-13. A breach of any one prong of the *Lemon* test is sufficient to establish a violation of the Establishment Clause. *Edwards v. Aguillard,* 482 U.S. ___, ___, 107 S.Ct. 2573, 2577 (1987); *Stone v. Graham,* 449 U.S. 39, 41 (1980).

In *Lynch,* this Court stated that Pawtucket's purposes for its display of a nativity scene—to celebrate the Holiday and to depict the origins of the season—were legitimate secular purposes. *Lynch,* 465 U.S. at 681, 691. In this case, the stated purpose of the Courthouse display was to celebrate the season and to express the holiday wish of peace on earth, good will to men. (J.A. 175; Def. Ex. A; R. 51,52). The District Court found these statements of expressed purposes to be the actual purpose for the Courthouse display (Cert. Pet. 5a); moveover, no evidence was presented

to indicate that the County's expressed purposes were "a sham." *Edwards v. Aguillard,* 482 U.S. at ___, 107 S.Ct. at 2573. Since the County's stated purposes were consistent with the purposes determined to be permissible in *Lynch* and there is no evidence of an actual purpose to endorse religion, the display in the County Courthouse satisfies the *Lemon* purpose criterion.

In analyzing the effect prong of *Lemon,* the *Lynch* decision requires that the benefit to religion created by a nativity display must be compared with other types of government activities benefiting religion. *Lynch,* 465 U.S. at 684; Comment, *Constitutional Law—American Civil Liberties Union v. City of Birmingham: Establishment Clause Scrutiny of a Nativity Scene,* 62 Notre Dame L.Rev. at 122. Even assuming *arguendo* that the County Courthouse display accentuates the religious aspect of the display, the context of the season nevertheless renders the difference between the *Lynch* display and the County Courthouse display *de minimus.* Clearly, in the context of the season, the benefits to religion of a presence of a nativity scene inside the Courthouse are no less "indirect, remote and incidental" when compared to the major benefits and endorsements of religion by government held to be constitutional in other cases than in *Lynch. Religious Displays: ACLU v. City of Birmingham—Establishment Clause Analysis of An Isolated Creche Since Lynch,* 55 UMKC Law Rev. 665, 672 (1987). Thus, the Courthouse display meets the effect prong as interpreted in *Lynch.*

Finally, the danger of enduring administrative entanglement between church and state is virtually non-existent in this case. The contact between the County's Director of Communication and the moderator of the Holy Name Society, the owners of the display, to schedule the erection

of the display in conjunction with the choral program, is brief and innocently matter-of-fact. (J.A. 178). Additionally, the evidence presented before the District Court conclusively shows that the County provides no special security, lighting or maintenance for the display and has little, if any involvement, in its erection, arrangement and assembly. Thus, like the scene in *Lynch,* the display in the County Courthouse contains "nothing . . . like the comprehensive discriminating, and continuing state surveillance or enduring entanglement present in *Lemon*". *Lynch,* 465 U.S. at 684, *quoting, Lemon,* 403 U.S. at 619-622.

In sum, the application of the *Lemon* test in the fashion prescribed by this Court in *Lynch* to the facts of this case yields the same result as it did in *Lynch.* Like *Lynch,* the County's display has a secular purpose. Like *Lynch,* the Courthouse display confers only indirect, remote and incidental benefits on religion. Like *Lynch,* the County's display presents little danger of enduring administrative entanglement. Therefore, even if one accepts the questionable premise that this case is factually distinguishable from *Lynch,* the Courthouse display nevertheless is still constitutional. Note, *Lynch v. Donnelly: Breaking Down The Barriers to Religious Displays,* 71 Cornell L.Rev. 185, 202 (1985).

B. ENDORSEMENT TEST

In her concurring opinion in *Lynch v. Donnelly,* Justice O'Connor stated that every government practice must be judged in its own unique circumstances to determine whether it constitutes an endorsement or disapproval of religion. *Lynch,* 465 U.S. at 694. Expanding on her view that the purpose and effect prongs of the three-part test in

Lemon v. Kurtzman were essentially a measure of governmental endorsement of religion, Justice O'Connor provided guidelines for assessing endorsement in her concurring opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985). In *Wallace*, Justice O'Connor declared that the relevant issue was whether an objective observer acquainted with the history, language and administration of the practice at issue would perceive the practice as an endorsement of religion. *Wallace*, 472 U.S. at 73, 76. Applying the endorsement test articulated by Justice O'Connor in *Wallace* to the facts presented to the District Court, any reasonable observer must conclude that the County's seasonal display was to commemorate and celebrate Christmas as a national holiday which is part of the common cultural heritage of all Americans and not to endorse religion.

First, the nativity scene is displayed in the Gallery/Forum portion of the County Courthouse, an area used every day for cultural events and art exhibits. As one County witness noted, the Grand Staircase has been used to display sculpture (J.A. 190) and for ceremonies held by citizen groups unrelated to County government. (J.A. 176).

Even while the nativity scene is on display, the art exhibit in the area is clearly visible from the site of the nativity scene. (J.A. 163; Def. Ex. F, G; R. 126, 127). In none of the cases which factually distinguished *Lynch* was the nativity scene displayed in an area commonly accepted and constantly used as an art gallery and exhibit area. Moreover, the Gallery/Forum area is not even at the main entrance of the Courthouse. (J.A. 157). In light of these circumstances, it cannot be fairly said that the Courthouse display has a religious purpose or advances religion.

Secondly, the nativity scene is surrounded by many typical reminders of the Christmas holiday season, such as

evergreen trees, wreaths, ribbons and poinsettias (J.A. 162). Similar decorations, including wreaths, trees and Santa Clauses, are displayed by various Departments and offices throughout the County Courthouse building. (J.A. 167). (A twenty foot live spruce tree, which was displayed on the top landing of the Grand Staircase in past years, was removed only because it was a potential fire hazard. (J.A. 168-69)).

Thirdly, the County's display of a nativity scene is in conjunction with the County's Christmas choral program. (J.A. 174; Def. Ex. C; R. 126, 127). The choral program, which has been in existence since 1968, is managed by the County's Director of Communications. This program, however, is not a religious one. Rather, local choral and orchestral groups, primarily from local public high schools (J.A. 158), perform music of their own choosing every day at lunchtime on the Grand Staircase. (J.A. 169). A large banner (Def. Ex. H; R. 126, 128) and news releases (Def. Ex. C; R. 126, 127) publicize the event to the public. A public address system broadcasts the music to the pedestrians passing by the building. (J.A. 167). Following each group's performance, the County's Communications Department publicizes each group's participation by releasing photographs of its performance to local newspapers. (J.A. 169; Def. Ex. I; R. 126, 129).

The County's Director of Communications testified that the County's Christmas display, including the nativity scene, evergreen trees, and flowers, provide the scenic foreground or setting for these choral programs. (J.A. 174); his testimony is supported by photographs and news releases. (Def. Ex. I; R. 126, 129).

It is undisputed that the County's choral program and the performance of high school students on the Grand

Staircase is a purely secular event, which is dedicated to peace and brotherhood and to the families of prisoners of war and the missing in action in Southeast Asia. (J.A. 160). Given that Allegheny County's Christmas display is integrated into a purely secular choral program, it is clear that a nativity scene was not included simply to provide it with the trappings of government but as traditional celebration of the season with its customary symbols.

Finally, Allegheny County is far more removed than the municipal government in *Lynch v. Donnelly* from the erection and maintenance of its nativity scene. The nativity scene at issue in *Lynch* was not only owned by the City of Pawtucket, but it was erected by city workers and illuminated with lights and electricity paid for by the city. *Donnelly v. Lynch*, 525 F.Supp. 1150, 1154-5 (D. R.I. 1981). Opening ceremonies were conducted by the Mayor, who threw a main switch, which simultaneously lit the display and the lights in City Hall. *Donnelly*, 525 F.Supp. at 1176.

It contrast, Allegheny County has no involvement with the nativity scene displayed in the Courthouse, other than providing space to store it and a dolly to move it. The head of the Holy Name Society, which owns the creche, insists on transporting and assembling the entire scene by himself, without the assistance of any County employees. The County does not conduct any opening ceremony for the Christmas display. Nor does it provide any special lighting, heating or security. (J.A. 165). The owners of the nativity scene not only provide a sign indicating to the public that tax dollars have not been used to purchase the nativity scene (J.A. 164), but they even provide their own straw for the stable and manger. (J.A. 165). In comparison, an objective observer would be far less likely to perceive the County's nativity scene display as an endorsement of

religion than the display in *Lynch v. Donnelly*, which was held to be constitutional.

Thus, the use of the Gallery/Forum area for cultural, civic and artistic events, the numerous Christmas decorations present in the Gallery/Forum area and throughout the Courthouse building, and the longstanding secular choral program combine with the overall context of the holiday season, to demonstrate that what the County of Allegheny has endorsed is Christmas and its collection of symbols—carols, trees, wreaths, good will and the birth of the figure from whom the holiday takes its name as well as original significance. *City of Chicago*, 827 F.2d at 131 (Easterbrook, J., dissenting).

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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Date: November 14, 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JANE DOE and JOHN DOE,
Plaintiffs,
v.
THE CITY OF WARREN,
Defendant.

Civil Action
No. 87-30084

MEMORANDUM OPINION AND ORDER

At a session of said Court held in the Federal Building, Port Huron, Michigan, on the 20th day of October, 1988.

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

This matter, involving the constitutionality of the defendant City of Warren's Christmas display, is before the Court on cross-motions for summary judgment. The plaintiffs allege that the inclusion in the display of certain religious symbols, specifically a creche and a menorah, violates the establishment clause of the first amendment of the United States Constitution. At a hearing on the plaintiff's motion for preliminary injunction, Judge Zatkoff found the display as secular in effect, and therefore denied the motion. The plaintiffs, pursuant to 42 U.S.C. §1983, continue to seek a permanent injunction, as well as money damages, against the defendant.

The Court concurs with the parties' assertion that no material issues of fact remain for resolution. The defendant displayed various symbols of the Christmas holiday

season, both secular and religious upon the front lawn of the Warren City Hall. These symbols included stars, candles, toy soldiers, a snowman, the creche, the menorah, and a Star of David. Based on these facts, the Court must determine whether, as a matter of law, the defendant City of Warren's holiday display violated the first amendment prohibition against governmental promotion of religion.

I.

The majority of establishment clause cases, and certainly Christmas display disputes, rely at least in part upon the Supreme Court's three-pronged analysis in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), for resolution. This analysis requires assessments of the actual purpose of the display, of the principal or primary effect of the display, and of whether the display causes excessive government entanglement with religion. *Lemon,* 612, 613. Typically, these cases turn on the second prong of the *Lemon* analysis; that is, whether the principal or primary effect of the display neither advances nor inhibits religion. This requires a finding that such a display is not "more beneficial to and more an endorsement of religion" than the varied practices previously held nonviolative of the establishment clause by the Supreme Court.[1] *Lynch v. Donnelly,* 465 U.S. 668, 681-682 (1984). Thus, "not every law that confers an 'indirect', 'remote', or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Lynch,* 683, citing *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 771 (1973)

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[1]Such practices include public funding of textbooks for church-sponsored schools, *Board of Education v. Allen,* 392 U.S. 236 (1968); noncategorical grants to church-affiliated colleges and universities, *Roemer v. Board of Public Works,* 426 U.S. 736 (1976); and tax exemptions for church properties, *Walz v. Tax Commission,* 397 U.S. 664 (1970).

In *Lynch*, the Supreme Court upheld the participation of the City of Pawtucket, Rhode Island, in the display of a creche, amidst several secular symbols, in a park owned by a nonprofit organization. In evaluating whether the city effectively endorsed religion through its inclusion of the creche, the Court referenced its earlier opinions sustaining legislative prayers and Sunday Closing Laws. *Marsh v. Chambers*, 463 U.S. 783 (1983); *McGowan v. Maryland*, 366 U.S. 420 (1961). The Court concluded that the effect of the city's inclusion of the creche "merely happens to coincide or harmonize with the tenets of some . . . religion." *Lynch*, 465 U.S. at 682, citing *McGowan, supra*, at 442. This effect was therefore distinguishable from the effect of providing religious instruction in public school classrooms, as well as the effect of the imparting of licensing veto authority in churches, found unconstitutional in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), and *Larken v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), respectively.

Having determined that the effect of the city's inclusion of the creche in the holiday display did not "confer a substantial and impermissible benefit on religion," and also having determined that a secular purpose, but no excessive administrative entanglement,[2] existed, the Court reversed the court of appeals and found the actions constitutional.

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[2]We have limited our discussion of *Lynch* to the "effect" prong of the *Lemon* analysis, since this is the only relevant inquiry on the present facts. Simply put, the Supreme Court in *Lynch* found that the city's use of the creche "to celebrate the Holiday and to depict the origins of that Holiday" established a secular purpose, and that the absence of day-to-day interaction between the church and the city regarding the creche supported the district court's finding of no excessive administrative entanglement. *Lynch*, 465 U.S. at 681, 684.

II.

The unfortunate consequence of the *Lynch* decision has been the tendency of lower federal courts to focus solely upon two factors in deciding the constitutionality of holiday displays. One factor might be termed "symbol counting," wherein a court apparently considers an entire display, places the secular symbols on one side and the religious symbols on the other, and waits for the balance to tip. *See American Civil Liberties Union v. City of Birmingham,* 791 F.2d 1561 (6th Cir. 1986), *cert denied,* 479 U.S. 939 (1986); *American Jewish Congress v. City of Chicago,* 827 F.2d 120 (7th Cir. 1987). While such an exercise may simplify the resolution of difficult issues, it could lead to the absurd result of inviting municipalities to add the constitutionally-mandated number of secular ornaments to a display in order to pass judicial muster. *See Birmingham, supra,* at 1567 (Nelson, J., dissenting). Additionally, by insisting on such an analysis, the courts will likely shift the central focus in holiday display cases from the effect of the displays to the actual purpose of the government in erecting them. *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

The second factor given much consideration in the post-*Lynch* decisions involves the geographical placement of the displays. *Chicago, supra,* at 127, 128; *American Civil Liberties Union v. Allegheny County,* 842 F.2d 655, 662 (3rd Cir. 1988). *cert granted,* No. 87-2050 (Oct. 3, 1988). Both *Chicago* and *Allegheny County* strongly emphasize the importance of the fact that the displays at issue were placed on public property. In *Allegheny County,* for example, the court relied on the *Chicago* opinion and noted that "[e]ven more significant [than the physical nature of the display], however, was the circumstance that unlike that in *Lynch v. Donnelly* the creche in *Chicago* was placed at the

official headquarters of the government and not in a private park." 842 F.2d at 660. Thus, in both *Chicago* and *Allegheny,* the displays were ruled unconstitutional. While geographical placement is certainly a relevant factor under *Lynch,* according it some weight in determining the constitutionality of a holiday display, this Court fears that it has been used to displace the entire analysis contemplated in *Lynch.*

Perhaps these courts, in an acknowledgement of the *Lynch* observation that "each case . . . calls for line-drawing," concluded that symbol counting and geographical placement represented the correct criteria for drawing the constitutional lines. This method, however, ignores *Lynch's* further admonition that the establishment clause "erects a 'blurred, indistinct, and variable barrier depending on *all* the circumstances of a particular relationship.'" *Lynch,* 465 U.S. at 679, citing *Lemon, supra,* 403 U.S. at 614 (emphasis added). The circumstances of apparent importance in *Lynch* included the "context of the Christmas season," a factor virtually overlooked in the opinions previously discussed.[3] Moreover, the Supreme Court expressly noted the historical underpinnings of the Christmas holiday celebration, finding that the prohibition of the display of the creche "at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains would be a stilted overreaction contrary to our history and to our holdings." *Lynch, supra,* at 686. Given

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[3]In *Birmingham,* the court stated that it recognized the Supreme Court's identification of the context of the season as an important factor in deciding holiday display cases, yet its analysis of this factor centered solely upon the physical nature of the display itself, with no reference to the overall atmosphere of the season. 791 F.2d at 1566, 1567.

this perspective, the Court recognized that "[a]ny notion that these symbols pose a real danger of establishment of a state church is farfetched indeed." *Id.* This aspect of *Lynch* is also omitted from consideration in the subsequent circuit court opinions.

III.

The foregoing discussion suggests that the Supreme Court in *Lynch* contemplated a flexible analysis in deciding holiday display disputes, in which the "effect" prong of the *Lemon* test must be tempered by the recognition of the Christmas season and the secular and religious history underlying its celebration. In this framework, the symbol-counting and geographic placement factors relied on in the circuit court opinions would have some relevance, yet would not in and of themselves dictate the end result.

Applying this analysis to the present facts, we find that the City of Warren's holiday display does not violate the establishment clause of the first amendment. The City erects the display on December 1, a time by which the holiday season is traditionally acknowledged as having begun. As such, the display may be viewed as "engender[ing] a friendly community spirit of goodwill in keeping with the season." *Lynch,* 465 U.S. at 685. Clearly, this would not be the case were the creche displayed during other times of the year. The fact remains, however, that historically nativity scenes have gained a customary position in the ornamental celebration of the Christmas holiday season.

The fact that the display is located on the lawn of the Warren City Hall admittedly merits some concern. There

is no denying that such placement may, in some individuals' minds, raise some questions regarding the government's association with religion. Again, however, this factor must be viewed in the totality of the circumstances. This requires addressing the final factor, an assessment of the physical content of the display. Unlike in *Birmingham* or *Allegheny,* the display in the City of Warren includes several secular symbols, such that the appearance of church and state collusion is lessened. This is, after all, the central concern of the effect prong of *Lemon:* that the government not appear to endorse a religion. Given this, along with the use of the display during the holiday season in a manner historically recognized, we find that the City of Warren's City Hall display poses no real danger of establishment of a state church as prohibited by the first amendment.

IV.

While apprised of the Supreme Court's recent grant of *certiorari* in *Allegheny, supra,* the Court believes that the nature of this case is such that resolution of these motions at this time is required. The Court therefore **GRANTS** the defendant City of Warren's motion for summary judgment and **DENIES** the plaintiff's cross-motion for summary judgment.

IT IS SO ORDERED.

JAMES HARVEY

JAMES HARVEY
United States District Judge